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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1958.

No. 541.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Brief for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Respondents' brief fails to meet the issues raised by petitioner. Instead, respondents attempt to attack the problem indirectly and introduce new theories which are not supported by the authorities cited, and are in direct conflict with the principles long established by the decisions of this court.

It is first argued that the warranty of seaworthiness does not apply to a vessel not in active navigation. This approach is apparently adopted from the defense which was asserted in *Atlas v. Interocean S. S. Co.*, 108 F. 2d 185; *Hauch v. American S. S. Co.*, 107 F. 2d 999; *Seward Wash Gravel Corp. v. McManigal*, 65 F. 2d 779. An examination of those decisions discloses, first, that these cases neither support the position of respondents nor are the issues in those cases similar to those at bar.

In *Antus v. Interocean S. S. Co., supra*, the suit was by an injured maritime worker claiming the benefit of the Jones Act along with the maritime law against his employer, the shipowner. The issue raised was whether the plaintiff was a "member of the crew" and therefore entitled to a damage remedy under the Jones Act, or whether he was a longshoreman whose remedy against his employer was limited to the Longshoremen's and Harbor Workers' Compensation Act.[1] In that case, the plaintiff had been a member of the crew of the vessel which had been engaged in navigation on the Great Lakes. With the arrival of the winter season and the freezing of the lakes, the vessel was taken out of service and laid up for the winter. The plaintiff, along with certain other men who had formerly been members of the crew, was retained for the sole purpose of laying up the vessel for the winter. The court held at page 187:

> [1] "After the enactment of the Jones Act in 1920 (46 U.S.C.A. 688), this court in *Chelentis v. Luckenbach Steamship Company*, 247 U.S. 372, held that the term 'seaman' as used in the Act embraced not only the regular ship's company, but also longshoremen and harbor workers who were engaged in the ship's service. Thus, longshoremen as seamen had the benefit of the Jones Act against their own employers, that is, the ship's company had the same benefits against the shipowner. This situation was changed by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901 (1927), which Act provided that the rights of longshoremen against their own employers would be limited to compensation under the Act. It left unchanged the longshoremen's rights against the vessel and vessel owners. After the enactment of the Longshoremen's and Harbor Workers' Compensation Act, it became necessary in those cases where the longshoremen were directly employed by the shipowner to determine whether the workers on the ship were part of the ship's complement or "members of the crew," in which event they could have the benefits of the Jones Act, or if they were to be characterized as longshoremen who were not part of the ship's complement, although directly employed by the shipowner, in which event their remedy was limited to the Compensation Act. These recent situations were therefore directly responsible for the issues raised in such cases as *Antus v. Interocean S. S. Co., supra*, the others relied upon by the respondent here.

"Clearly if appellant at the time of the accident had been engaged in maritime work he would have been a seaman within the provisions of the statute. But the question is whether at the time of the accident he was engaged in maritime work, and the test is the nature of his employment at the time. While the work done had direct relation to navigation, it neither was performed during the navigation season, *nor was it even preparatory to navigation.*

* * *

The vessel, while not consigned to a ship's graveyard, was tied up to the piles. *Instead of doing this work in preparation for navigation, the men were preparing the vessels for winter quarters.*" (Emphasis ours.)

It is clear from that decision that if the injured worker had been engaged in preparing the vessel for sea instead of laying it up for the winter, his work would have been a maritime service in furtherance of navigation and he, therefore, would have been regarded as a member of the crew.

And, in *Hines v. American S. S. Co.*, 107 F. 2d 999, the vessel had been laid up and was being prepared for use as a storage place for soya beans. The plaintiff in that case was injured while engaged in that project. The court there held that preparing the vessel for storage purposes was not a maritime service in furtherance of navigation; that since no navigation was to follow the service in which the plaintiff was engaged, he could not be regarded as a member of the crew and, therefore, entitled to maintenance and cure, but was relegated to his remedy under the Compensation Act.

In *Seattle Wash. Girder Corp. v. McManigal*, 65 F. 2d 779, a watchman on a vessel which had been laid up for the winter was drowned, and his personal representative instituted a damage action under the Jones Act. The case was dismissed on the ground that the decedent was not a

"member of the crew" and, therefore, not entitled to the benefits of the Jones Act. The administrator then filed his claim under the Compensation Act and the defendant there reversed its position and contended that the maritime law applied to the exclusion of the Compensation Act. The court held that the watchman was not engaged in any service related to or in furtherance of navigation and that his activities on the vessel were not in anywise a maritime service, since the vessel was in a laid-up status for the winter. Accordingly, the court concluded that the decedent was not a member of the crew and that his remedy against the shipowner had been properly under the Compensation Act.

Thus, these cases do not stand for the proposition alleged by respondents that the warranty of seaworthiness cannot apply to injury on board vessels which are not in active navigation. On the contrary, these decisions clearly hold that where a vessel is being laid up, then such services are not in aid of or in furtherance of navigation and, therefore, are not maritime services. Under these circumstances a man injured in the course of such service may not claim the status of a member of the crew entitled to the benefits of the Jones Act against the shipowner, his employer. Those cases further unequivocally hold that where the services are designed, as in the case at bar, to prepare the vessel for sea, then such services are indeed in furtherance of navigation, and where the shipowner is the employer he may be held responsible under the Jones Act.

If the respondents were correct in their contention that the issues in their cited cases paralled the issue in the case at bar, it is nevertheless clear that the work in which petitioner was engaged was maritime in nature, since it must be conceded that all of the work on the vessel was being done to prepare it for sea. The contract for overhauling the vessel expressly so provides.

It must be noted, however, that the instant case poses a different issue. Here, plaintiff was employed by an inde-

pendent contractor, as in *Seas Shipping Company v. Sieracki*, 328 U. S. 85. He was not employed by the vessel owner. His suit against the shipowner, therefore, does not rest upon the Jones Act and he is, therefore, not required to establish himself as a "member of the crew." It is essential only that he show that he was performing services on board the vessel, which services were maritime in nature. In this case, the work of preparing the vessel for sea was clearly in furtherance of navigation and was therefore a maritime service.

Respondents also contend that the warranty of seaworthiness does not apply because the work in which petitioner was engaged was not "seaman's" work. In support of this contention, respondents repeatedly assert that the work in which petitioner was engaged involved "home port major structural repairs." It is significant that in no instance do respondents point to the evidence in support of this conclusion. A review of the contract in evidence decisively negates any suggestion that the work being done on this vessel involved any structural repairs, let alone major structural repairs. The contract demonstrates that the work generally involved an overhauling and cleaning of the vessel's equipment, and the repair or replacement of missing parts. All of this work has, since time immemorial, been regularly performed by seamen during and between voyages. In fact, the petitioner was employed because he was a licensed marine engineer who had served on vessels and was, therefore, familiar with the very work involved in this operation. At the time of his accident, he was working on equipment in a manner in which he had long been accustomed from active service on vessels as a marine engineer. There is thus no basis for respondent's oft repeated but never supported statement that the work on this vessel involved major structural repairs.

In this connection, consideration must be given to the dividing line, if any, in the type of repairs which are recognized to be "seamen's" work, as distinguished from "ship

building" work. Judge Learned Hand in *Berge v. National Bulk Carriers*, 251 F. 2d 717, considered that very point. There the entire interior of the vessel was torn out and, as the lower court found, "The work amounted to a virtual rebuilding of the interior of the vessel" (148 F. Supp. 611). Judge Hand found that the contract was not merely a repair job, but was one for a rebuilding of the vessel, as follows (p. 718):

> "The owner made a contract with Todd Shipyards Corporation to take the vessel to its own shipyard and *rebuild* her in accordance with approved plans and specifications." (Emphasis ours.)

In distinguishing between an overhauling and repairs, as in the instant case, and a rebuilding job as in the *Berge* case, Judge Hand went on to say at page 718:

> "Obviously there must be some limit, else the whole fabrication of a new ship would be included. We can only say that the *reconstruction* of a ship was not traditionally the task of the crew." (Emphasis ours.)

Assuming this distinction drawn by Judge Hand, which apparently respondents adopt, the facts in the case at bar fall clearly in the orbit of "seamen's" work. *See U. S. v. Lindgren*, 28 F. 2d 725, affirmed 281 U. S. 38. Respondents have not been able to point to a single part of the contract which involves structural repairs, which contract on the contrary calls for the cleaning and overhauling. This work has regularly been performed by members of the crew since the earliest days of merchant shipping.

Respondents seize upon the further argument that the shipowner in this case should not be held liable because the control of the repairs was lodged with the contractor, and the role of the United States, as shipowner, was limited to inspection of the work of the contractor. In support of this

contention, respondents rely upon *Guerrini v. U. S.*, 167 F. 2d 352 (2 Cir.). Respondents completely ignore the fact that the same court of appeals expressly recognized that the *Guerrini* case had been overruled by this court's decision in *Alaska S. S. Co. v. Petterson*, 347 U. S. 329.

In *Halecki v. United N. Y. and N. J. Sandy Hook Pilots Assn.*, 251 F. 2d 708, Judge Hand, in discussing this very issue which was presented in the *Halecki* case, disposed of the *Guerrini* case and the argument which is now presented, in these terms (p. 711):

> "In Guerrini v. United States, 2 Cir., 167 F. 2d 352, the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, did not apply. *However, that was in 1948 before either Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 or Petterson v. Alaska SS. Co., 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of 'control' of the ship was relevant.*" (Emphasis ours.)

As Judge Hand so clearly points out, the so-called "control theory" was specifically rejected by this court in *Petterson*, and respondents' argument on this point is, likewise, in direct conflict with the clear pronouncements of this court.

The record demonstrates that the "Mary Austin" had been taken out of her laid-up status in Norfolk, Virginia, and thereafter navigated under tow through the Chesapeake Bay and on the high seas along the East Coast into the Delaware Bay, and thereafter moored alongside a dock in the Port of Philadelphia for the general overhaul outlined

in the contract. From the time she was taken out of Norfolk and throughout the entire period that the vessel was being overhauled, she was manned by a master and five other ship's officers, who inspected the work as it progressed and who stood regular watches on the vessel during the operations.[2] The work itself did not involve any structural repairs, but was of a nature which traditionally had been performed by seamen. The captain and the other officers, as seamen, were delegated to inspect the work as it went along. Moreover, seamen, such as petitioner, were selected for the actual performance of the work because of their experience on merchant vessels. Thus, the actual performance of the work and its supervision were in the hands of regular merchant marine personnel who were familiar with the work by virtue of their experience in these same duties on board vessels. Upon these undisputed factual considerations, petitioner is entitled to the benefit of the warranty of seaworthiness.

In addition to the respondents' obligation for unseaworthiness, liability is also clear upon principles of negligence because of respondents' *non-delegable duty* to provide a safe place to work and a safe method of operation and procedures. See *United New York & N. J. Sandy Hook Pilots Assn. v. Halecki*, 3 L. Ed. 2d 541.

The decision of the court below should be reversed.

Respectfully submitted,

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[2] Respondents admitted in answer to interrogatories that these seamen were "members of the crew" of the Mary Austin during this entire period. (Supplemental answers to interrogatory No. 6.)